COURT OF APPEALS
DECISION
DATED AND FILED

December 15, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1133-CR **Cir. Ct. No. 2006CF5833**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSHUA JAMES SCOLMAN,

DEFENDANT-APPELLANT.

APPEAL from judgments and orders of the circuit court for Milwaukee County: JEFFREY A. WAGNER and JEFFREY A. CONEN, Judges. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 KESSLER, J. Joshua James Scolman appeals from judgments convicting him of numerous offenses arising out of a fatal drunk-driving accident and his subsequent threats and firing of a gun. He also appeals from orders

denying his motion for post-conviction relief, including an order entered after we reversed and remanded this case for a ***Machner*** hearing.[1] We affirm.

BACKGROUND

¶2 We discussed the background facts of this case in our prior decision. *See* ***State v. Scolman***, No. 2007AP2682-CR, unpublished slip op. (WI App Oct. 2, 2008). Scolman drove his vehicle while intoxicated and collided with another vehicle. Three occupants of that vehicle were killed and another was seriously injured. Next,

> Scolman exited his vehicle and began yelling at an innocent motorist, Donte Sims, about the damage to his car. Scolman pointed a gun at Sims'[] head and threatened to shoot. He ignored Sims' suggestion that they should help the accident victims. Scolman then chased Sims and fired four or five shots. Sims escaped unharmed. Scolman later resisted officers who were trying to search him for weapons.

Id., ¶2. Scolman was arrested and charged with nine felonies and a misdemeanor. This included charging Scolman with "two offenses for each of the persons he killed or injured," including "death or injury by intoxicated use of a vehicle and causing death or injury while operating a vehicle with a prohibited [blood alcohol content]." ***Id.***, ¶3. Scolman was also charged with first-degree recklessly endangering safety and resisting an officer.

¶3 The charges against Scolman were resolved by a plea agreement, which the State summarized at the plea hearing. The State indicated that Scolman

[1] The Honorable Jeffrey A. Wagner accepted Scolman's plea, sentenced him and denied his postconviction motion. On remand, the Honorable Jeffrey A. Conen conducted the ***Machner*** hearing and denied Scolman's postconviction motion. *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

would plead no contest to the following: three counts of homicide by intoxicated use of a motor vehicle, *see* WIS. STAT. § 940.09(1)(a) (2005-06);[2] one count of injury by intoxicated use of a vehicle causing great bodily harm, *see* WIS. STAT. § 940.25(1)(a) (2005-06); one count of endangering safety by use of a dangerous weapon, *see* WIS. STAT. § 941.20(1)(a) (2005-06); one count of disorderly conduct while armed with a dangerous weapon, *see* WIS. STAT. §§ 947.01 & 939.63 (2005-06); and one count of resisting an officer, *see* WIS. STAT. § 946.41(1) (2005-06). The State said that it had "agreed to recommend a period of substantial, long confinement," the length of which "would be left to the wisdom and discretion of the court." The State said it "would be free to argue any aggravating or mitigating circumstances of this case."

¶4 With respect to the charges related to Sims, the State noted that Sims was "in agreement" with amending the original charge of first-degree recklessly endangering safety (a felony), to two misdemeanors: endangering safety by use of a dangerous weapon and disorderly conduct while armed with a dangerous weapon. The State explained why this amendment was reasonable, including because Sims did not see Scolman fire the shots.

¶5 The State asked the trial court to accept the amended information, which no longer contained charges related to death or injury with a prohibited blood alcohol content ("BAC"). The amended information also removed the felony charge related to Sims and substituted the two aforementioned misdemeanors.

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶6 Counsel for Scolman indicated that the plea agreement had been stated correctly and confirmed that Scolman would be entering no-contest pleas to all counts. She also told the trial court that she had discussed the instructions with Scolman, including going through "each of the elements as to each of those offenses at great length yesterday." However, she indicated, she did not bring copies of the jury instructions with her to the plea hearing.

¶7 The trial court proceeded to conduct a standard plea colloquy with Scolman. In the course of that colloquy, both the defense and the State discussed the factual bases for the pleas. The State then noted several additional things about the plea. First, it noted that a civil case against Scolman would proceed with his assistance. Second, the State said that "this will be all the charges charged in this particular case. There won't be any additional charges." Finally, the State discussed the fact that the four BAC charges had been removed by operation of law:

> [T]he court notices that the BAC counts on each of the homicide by intoxicated use of motor vehicle charges and the injury by intoxicated use of a vehicle charge[,] great bodily harm[,] no longer appear[] on the amended information.
>
> That is not discretionary. That is a matter of law. The state Supreme Court has ruled that to be convicted of both the intoxicated use of a motor vehicle and the BAC count is double jeopardy and you cannot sentence on both of those cases.[3] So [t]hat's why those counts did not

[3] Wisconsin statutes are consistent with case law. Pursuant to WIS. STAT. § 940.09(1m), if a person is found guilty of both causing a person's death by the intoxicated use of a vehicle and causing a person's death while operating a vehicle with a prohibited BAC, only a single conviction and sentence can be imposed for the death of that person. Similarly, WIS. STAT. § 940.25(1m) mandates that if a person is found guilty of both causing injury to a person by the intoxicated use of a vehicle and causing injury to a person while operating a vehicle with a prohibited BAC, only a single conviction and sentence can be imposed for the injury to that person.

> appear in the amended information[,] for the edification of anyone here.

The trial court then continued the colloquy with Scolman, who ultimately entered no-contest pleas to each count in the amended information. The trial court found Scolman guilty of each charge and set the matter for sentencing.

¶8 At sentencing, the trial court imposed a total sentence of fifty-two-and-one-half years of initial confinement and nineteen years of extended supervision. Scolman filed a postconviction motion that sought to allow him to withdraw his plea based on manifest injustice or, in the alternative, sentence modification.

¶9 With respect to his request to withdraw his plea, Scolman alleged that his pleas were not entered voluntarily, knowingly and intelligently because he did not know that the four counts of injury or death due to having a prohibited BAC were going to be dismissed due to operation of law, as opposed to being a concession from the State pursuant to the plea agreement. We summarized Scolman's argument in our previous decision: "He thought the plea agreement benefitted him by dismissing the four BAC charges when, in reality, the dropped charges did not affect his sentencing exposure. He alleged that he would not have entered the no contest pleas if he had known about [WIS. STAT.] § 940.09(1m)." ***Scolman***, No. 2007AP2682-CR, unpublished slip op. ¶4.

¶10 The trial court denied Scolman's motion without a hearing and he appealed. On appeal, we affirmed in part, reversed in part and remanded the case for a ***Machner*** hearing. Specifically, we concluded that Scolman was entitled to an evidentiary hearing on his motion to withdraw his no-contest pleas. ***Scolman***, No. 2007AP2682-CR, unpublished slip op. ¶5. We explained:

> He alleged sufficient facts that, if true, demonstrate he did not understand the law as it relates to his plea agreement. *See* ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). The record does not show that Scolman was informed that he could only have been sentenced on four of the eight offenses relating to death and injury. The effect of WIS. STAT. § 940.09(1m) is not a matter of common knowledge and it is not evident that Scolman would have entered the no contest pleas had he understood the limited nature of the plea agreement.
>
> Scolman faults his trial counsel for failing to explain WIS. STAT. § 940.09(1m). At the postconviction hearing, the burden will be on Scolman to establish deficient performance and a reasonable probability that he would not have entered the no contest pleas but for counsel's errors. *See* ***Hill v. Lockhart***, 474 U.S. 52, 57 (1985). Regardless of whether Scolman establishes ineffective assistance of counsel, he is entitled to withdraw his plea if he can establish that the plea was not knowingly, voluntarily and intelligently entered. *See* ***State v. Brown***, 2006 WI 100, ¶42, 293 Wis. 2d 594, 716 N.W.2d 906.

Scolman, No. 2007AP2682-CR, unpublished slip op. ¶¶5-6. We rejected Scolman's other challenges, including allegations that the trial court had an obligation to determine whether Scolman understood WIS. STAT. § 940.09(1m), that the prosecutor breached the plea agreement and that Scolman was entitled to sentence modification because the trial court emphasized deterrence and imposed a harsh sentence. *See* ***Scolman***, No. 2007AP2682-CR, unpublished slip op. ¶¶7-10.

¶11 On remand, Scolman's trial counsel testified at the ***Machner*** hearing. She said she could not recall specifically reading through WIS. STAT. § 940.09(1m)(a) and (b) with Scolman, but she stated multiple times that she was "sure" she would have explained to Scolman that the counts based on Scolman's

BAC would be dropped as a matter of law.[4] She testified that she spoke with Scolman "many, many times" about his plea and met with him for a total of twenty to twenty-four hours. Trial counsel also acknowledged that on the day of the plea hearing, Scolman did not ask her to explain anything about the dropping of the BAC charges, even after the State noted in open court that the BAC charges would be dismissed as a matter of law.

¶12 Scolman also testified at the ***Machner*** hearing. He said he did not recall his trial counsel ever telling him that if he was found guilty of causing death or injury by intoxicated use of a vehicle, the BAC charge for that same death or injury would be dismissed. He testified as to his understanding of the plea agreement:

> I thought that when I pled no contest that the BAC charges would be dropped, along with … the gun felony and some other felonies would be dropped to misdemeanors. So my assumption was that when I pled no contest, my exposure [would be reduced]…. So my plea was to get half the time reduced … so it was actually a good deal in my eyes. But come to find out that it wasn't a deal at all.

On cross-examination, Scolman testified that he did not ask trial counsel why the BAC counts were going to be dismissed. Scolman also acknowledged that he was present when the State told the trial court that the BAC counts had been removed because Scolman could not be convicted of causing death by intoxicated use and causing death while driving with a prohibited BAC. Scolman was not asked to explain what he thought of the State's statements concerning the BAC charges, but

[4] Trial counsel initially testified that she was not sure that she had discussed with Scolman that the BAC charges would be dropped if he entered a plea to causing death or injury by intoxicated use of a vehicle, but she subsequently testified four times that she was sure she had.

he testified earlier that he did not "remember anything" about the plea hearing "because it was such a horrifying experience that I couldn't tell you what happened."

¶13 The trial court found that trial counsel had discussed with Scolman the dismissal of the BAC charges by operation of law. The trial court also rejected Scolman's testimony that he did not "remember anything about the plea hearing" and "just blindly said yes and no to everything." The trial court concluded that trial counsel had not performed deficiently because she had, in fact, told Scolman about the fact that the BAC charges would be dismissed by operation of law. The trial court concluded that Scolman had also not proven that he was prejudiced by his trial counsel's alleged deficiency. Finally, the trial court found that Scolman had entered his pleas freely, voluntarily and intelligently and, therefore, plea withdrawal was not warranted. This appeal follows.

LEGAL STANDARDS

¶14 "After sentencing, a defendant who seeks to withdraw a guilty or no contest plea carries the heavy burden of establishing, by clear and convincing evidence, that withdrawal of the plea is necessary to correct a manifest injustice." ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997); *see also* ***State v. Hoppe***, 2009 WI 41, ¶60, 317 Wis. 2d 161, 765 N.W.2d 794 ("[A] defendant is entitled to withdraw his [or her] guilty plea if the [trial] court's refusal to allow withdrawal of the plea would result in a manifest injustice."). "The withdrawal of a plea under the manifest injustice standard rests in the [trial] court's discretion." ***McCallum***, 208 Wis. 2d at 473. On appeal, we will reverse the trial court only if it failed to properly exercise its discretion, such as if it bases its exercise of discretion on an erroneous application of the law to the facts. ***Id.***

¶15 A defendant may demonstrate a manifest injustice by showing that he or she was denied the effective assistance of counsel, *see* ***State v. Wesley***, 2009 WI App 118, ¶22, ___ Wis. 2d ___, 772 N.W.2d 232, or that the guilty plea was not made knowingly, intelligently, and voluntarily, *see* ***Hoppe***, 317 Wis. 2d 161, ¶60. When a defendant alleges ineffective assistance as a basis to withdraw a plea, the defendant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defendant. *See* ***Wesley***, 772 N.W.2d 232, ¶23. Applying the ineffective assistance standard in the plea withdrawal context, a defendant may establish a manifest injustice by showing that counsel's conduct or advice was objectively unreasonable and that, but for counsel's error, the defendant would not have entered the plea. *See* ***State v. Bentley***, 201 Wis. 2d 303, 311-12, 548 N.W.2d 50 (1996).

¶16 When a defendant alleges that he or she should be allowed to withdraw his or her plea because the plea was not knowingly, intelligently, and voluntarily, this court is presented with a question of constitutional fact. ***Hoppe***, 317 Wis. 2d 161, ¶61. "We accept the [trial] court's findings of historical and evidentiary fact unless they are clearly erroneous … [but w]e independently determine whether those facts demonstrate that the defendant's plea was knowing, intelligent, and voluntary." ***Id.*** (footnote omitted).

DISCUSSION

¶17 At issue is whether Scolman is entitled to withdraw his pleas either because he was denied the effective assistance of counsel or because his pleas

were not knowingly, voluntarily and intelligently entered.[5] *See* ***Scolman***, No. 2007AP2682-CR, unpublished slip op. ¶¶5-6. We examine each issue in turn.

I. Ineffective assistance of counsel.

¶18 The trial court found that trial counsel had not performed deficiently. It specifically found that trial counsel had informed Scolman that the BAC charges would be dismissed as a matter of law if Scolman entered pleas to the driving while intoxicated charges. On appeal, Scolman implicitly challenges this finding of fact, arguing that trial counsel "testified that she could not specifically recall explaining that these charges were being dismissed as a matter of law." We are not convinced that the trial court's finding is clearly erroneous.

¶19 It is true that trial counsel initially answered "[t]hat's correct" when she was asked if she was "not sure" that she told Scolman that the BAC charges would be dismissed as a matter of law. However, she subsequently stated four times during her testimony that she was sure that she had told Scolman of that fact. Resolving discrepancies in trial counsel's testimony was within the province of the trial court, whose role it was to evaluate the credibility of the witnesses and make findings concerning the taking of the plea. *See* ***State ex rel. Brajdic v. Seber***, 53 Wis. 2d 446, 450, 193 N.W.2d 43 (1972) ("Discrepancies in the testimony of a witness do not necessarily render it so incredible that it is unworthy of belief as a matter of law…. [The factfinder must] determine where the truth lies in a normal

[5] Scolman also argues that the trial court erroneously denied his postconviction motion for sentence modification. In Scolman's previous appeal, we rejected this argument and did not direct that it be reconsidered on appeal. We decline to revisit this issue.

case of confusion, discrepancies, and contradictions in testimony of a witness."). The trial court's finding is not clearly erroneous.

¶20 Scolman also notes that trial counsel could produce no written correspondence documenting that she spoke about this issue with Scolman. We are not convinced this renders the trial court's finding erroneous. Whether there was written documentation of trial counsel's discussion with Scolman goes to the weight of trial counsel's testimony, not to whether the trial court was entitled to find that trial counsel informed Scolman that the charges would be dismissed as a matter of law. Likewise, we are unconvinced that Scolman's complaints about his trial counsel's completion of the plea questionnaire negate the trial court's explicit finding that trial counsel told Scolman about the dismissal of the BAC charges.

¶21 Finally, Scolman complains that the trial court "improperly placed significant weight on [trial counsel's] experience in criminal law cases in the past, and failed to recognize the deficiencies of her performance as counsel in this particular case." We are not persuaded. The trial court considered the fact that trial counsel had significant experience in criminal cases, but also the amount of time she met with Scolman and her efforts on the case. We do not agree with Scolman's suggestion that the trial court believed trial counsel's testimony that she told Scolman about the BAC charges simply because she was an experienced criminal attorney.

¶22 We conclude that the trial court's finding that trial counsel told Scolman, prior to the plea hearing, about the dismissal of the BAC charges was not clearly erroneous. Trial counsel's performance was therefore not deficient. Because Scolman has failed to prove deficiency, we do not consider whether but for counsel's error, the defendant would not have entered the plea. *See* ***Bentley***,

201 Wis. 2d at 312; *see also* ***Strickland v. Washington***, 466 U.S. 668, 697 (1984) (court need not address both deficiency and prejudice prongs of ineffective assistance test if defendant fails to make sufficient showing on either one). Finally, we affirm the trial court's decision to deny Scolman's motion to withdraw his plea because he has not proven by clear and convincing evidence a manifest injustice related to ineffective assistance of counsel. *See* ***McCallum***, 208 Wis. 2d at 473.

II. Whether the pleas were knowingly, voluntarily and intelligently entered.

¶23 Scolman contends that the trial court erroneously found that his pleas were knowingly, voluntarily and intelligently entered. First, Scolman maintains his pleas were not so entered because he did not know that the dismissal of the BAC charges was required as a matter of law, as opposed to being a concession from the State. The trial court rejected Scolman's testimony concerning what he knew at the time of the plea as "self-serving." Further, as discussed above, the trial court found that trial counsel had, in fact, told Scolman about the dismissal of the charges. In addition, it is undisputed that the State discussed the reason for dismissing the charges at the plea hearing, and Scolman did not raise any objection or question after hearing those statements. Given the undisputed facts and the trial court's factual findings on disputed matters, which are not clearly erroneous, we affirm the trial court's finding that Scolman has not proven that his alleged lack of knowledge of the BAC charges rendered his pleas unknowing, involuntary and unintelligent.

¶24 Next, Scolman contends that his pleas were not knowingly, voluntarily and intelligently entered because the plea questionnaire did not include the elements of the charges Scolman faced. Scolman's single-paragraph argument

does not assert that Scolman did not, in fact, know the elements of crimes to which he pled. Rather, Scolman appears to suggest, without citation to authority, that the fact the elements were not listed on or attached to the plea questionnaire renders his pleas insufficient as a matter of law. We reject this argument without further discussion because it is not adequately briefed. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (appellate court can "decline to review issues inadequately briefed" or without citation to legal authority).

¶25 Scolman also argues that at the ***Machner*** hearing, the trial court "improperly limit[ed] the inquiry to whether Scolman entered the plea after knowing the maximum exposure he could face." (Some capitalization omitted.) We disagree with Scolman's characterization of the record. At the beginning of the ***Machner*** hearing, the trial court attempted to ascertain from the parties what precisely would be discussed at the hearing, in light of the court of appeals' order remanding the case. Trial counsel and the trial court had the following exchange:

> [Trial counsel:] [Scolman] claims that he thought [the BAC charges] were being dismissed as part of plea negotiations. In other words, he thought by pleading to the OWIs, the State would dismiss and remove the BACs, therefore, lessening his potential exposure to prison time….
>
> THE COURT: I understand that. However, we're not here on the fact that he misunderstood the maximum penalties, correct?
>
> [Trial counsel:] I think we're here to try to figure out what he understood the plea negotiations or plea bargain to be.
>
> THE COURT: That's not my question….
>
> ….
>
> The logical follow-up to that would be that he misunderstood what the maximum penalties were.
>
> ….

> And it's my understanding that that's not part of this narrow issue, correct?
>
> [Trial counsel:] He was properly advised of the maximum penalties.
>
> ….
>
> … [I]t was his view that he really wasn't getting a bargain, or negotiated plea; he was getting something that would have happened to him anyway.
>
> ….
>
> THE COURT: … I'm still a little confused, because I guess what I want to know … is, is there a claim … that he didn't understand the maximum penalties?
>
> [Trial counsel:] No.

This exchange indicates that the trial court did not improperly limit testimony. Rather, the trial court tried to focus the hearing on the issues presented, after asking trial counsel to clarify those issues. Scolman did not at any time object or suggest that the scope of the hearing was being unfairly limited.

¶26 We also note that Scolman ultimately *did* testify about expectations concerning the exposure he faced, in the course of summarizing what he believed the plea agreement to be:

> I thought that when I pled no contest that the BAC charges would be dropped, along with some—the gun felony and some other felonies would be dropped to misdemeanors. *So my assumption was that when I pled no contest, my exposure, which obviously doesn't matter, but was cut in half, y'know what I mean? So my plea was to get half the time reduced,* you know, so it was actually a good deal in my eyes. But come to find out that it wasn't a deal at all.

(Emphasis added.) Because the trial court did not improperly limit the testimony, and Scolman in fact testified about his expectations concerning his exposure, we reject his argument.

¶27 Finally, Scolman argues that his pleas were not knowing, intelligent and voluntary because the trial court did not conduct an adequate plea colloquy in order to ascertain Scolman's understanding of the BAC charges and the elements of the offenses to which he was pleading no contest. Scolman acknowledges that this issue was decided against him in the earlier appeal, but urges this court to revisit the issue in the interest of justice. We decline to do so.

By the Court.—Judgments and orders affirmed.

Not recommended for publication in the official reports.